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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BLANCA BATISTA HANS, Appellant.	2 CA-CR 2007-0289 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR46118

Honorable Hector E. Campoy, Judge

AFFIRMED IN PART
VACATED AND REMANDED IN PART

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V Á S Q U E Z, Judge.

¶1 A jury found appellant Blanca Hans guilty of transportation of marijuana for sale and possession of marijuana for sale. The trial court suspended the imposition of sentence and placed her on probation for seven years. It also ordered that a warrant for her arrest would be issued thirty days after she was placed on probation, presumably to deter her from reentering the country illegally. She now contends the latter order was illegal because it was not based on probable cause to believe she had committed any offense or violated probation. She also argues her convictions for both transportation of marijuana for sale and possession of marijuana for sale violated double jeopardy principles.[1] For the following reasons, we vacate the arrest warrant and conviction for possession of marijuana for sale, but affirm the remaining conviction and probation in all other respects.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On June 22, 1994, Department of Public Safety Officer Torres was patrolling State Route 83, when he noticed a vehicle approaching from the rear at a high rate of speed. He allowed the vehicle to pass him and, using a radar gun, determined the vehicle was traveling at sixty-three miles per hour in a fifty-five-mile-per-hour zone. Torres then observed the vehicle "sway[ing] in its lane from line to line" and initiated a traffic stop. When he approached the vehicle and began

[1]Hans failed to raise this issue either below or in her opening brief. However, in its answering brief the state raised the issue and conceded error, and Hans addressed it in her reply brief.

speaking with the driver, Hans, he noticed a slight odor of marijuana. Both Hans and the passenger denied there were any weapons or contraband in the car, and when Torres asked if he could search the car, Hans consented. Torres found eight bundles of marijuana totaling 160 pounds inside the trunk. After Torres advised Hans of her constitutional rights in accordance with *Miranda*,[2] Hans stated that she had been paid $500 to drive the car from Sonoita to Tucson.

¶3 Hans was charged with unlawful possession of marijuana for sale, having a weight of four pounds or more, and unlawful transportation of marijuana for sale, having a weight of two pounds or more. After Hans failed to appear for the pretrial conference and trial, the court conducted her trial in absentia. A jury found her guilty of both charges. Hans was arrested in July 2007. Based on Hans's medical condition, the state dismissed the allegations that the weight of the marijuana was above the threshold amount for sentencing purposes.[3] The trial court suspended the imposition of Hans's sentence and placed her on probation for seven years.

¶4 As conditions of probation, the court ordered Hans not to remain in or enter the United States illegally and informed her that thirty days after the sentencing hearing it

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[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[3]Section 13-3405(C), A.R.S., provides that if the aggregate amount of marijuana equals or exceeds the statutory "threshold amount" of two pounds under § 13-3401(36)(h), a person convicted under § 13-3405(B)(6) and (11) is not eligible for probation.

> intend[ed] to issue a [National Crime Information Center] bench warrant for her arrest, so that if she is stopped by any law enforcement, we will have a trigger and she will be brought before [the court] or any other judge for the next seven years to explain why she came back in the United States illegally presumably.

Discussion

I. The Arrest Warrant Was Not Supported by Probable Cause

¶5 Hans contends the court's issuance of this "anticipatory" bench warrant was unlawful because it was not supported by probable cause to believe she had committed an offense or otherwise violated probation. She asks us to quash the warrant. This is a question of law that we review de novo. *See State v. Smith*, 215 Ariz. 221, ¶ 14, 159 P.3d 531, 537 (2007). Because she failed to object to the issuance of the warrant below, we review this claim for fundamental error only, and we will not reverse absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). The imposition of an illegal sentence constitutes fundamental, prejudicial error.[4] *State v. Joyner*, 215 Ariz. 134, ¶¶ 5, 32, 158 P.3d 263, 266, 273 (App. 2007).

[4]To the extent the state argues that the anticipatory warrant "does not seem to constitute a 'penalty'" within the meaning of Rule 26.1, Ariz. R. Crim. P., because it may never be executed, we disagree. The warrant was issued as a part of the court's order placing Hans on probation. It is thus part of the "sentence" that was imposed under Rule 26.1. *See State v. Falco*, 162 Ariz. 319, 321, 783 P.2d 258, 260 (App. 1989) ("[A]lthough an order imposing probation is not ordinarily a sentence, . . . when used in the context of Rule 26 . . . , the term 'sentence' does include probation.").

¶6 Hans relies on Rule 27.6(b), Ariz. R. Crim. P., to support her contention that a trial court lacks the "authority . . . to issue a[n arrest] warrant absent the filing of a petition to revoke probation stating 'reasonable cause' to believe the probationer has violated a written condition of probation." *See* Rule 27.6(a); *see also Drury v. Burr*, 107 Ariz. 124, 125, 483 P.2d 539, 540 (1971) (equating reasonable and probable cause). We disagree with this narrow interpretation of the rule because there is nothing in the rule itself that suggests it provides the exclusive authority for a trial court's issuance of a bench warrant. *See State v. Cotton*, 197 Ariz. 584, ¶ 6, 5 P.2d 918, 920 (App. 2000) ("In construing statutes, we give words their plain and ordinary meaning."). And, A.R.S. § 13-901(C) provides:

> The court, in its discretion, may issue a warrant for the rearrest of the defendant and may modify or add to the conditions or, if the defendant commits an additional offense or violates a condition, may revoke probation in accordance with the rules of criminal procedure at any time before the expiration or termination of the period of probation.

¶7 Relying on § 13-901(C), the state contends "the trial court has discretion during the term of probation to issue a warrant for the arrest of the petitioner in circumstances not limited to when a petition to revoke has been filed." Although we do not necessarily disagree with this proposition, it does not answer the question whether such a warrant may be issued in the absence of probable cause to believe the probationer has violated the terms of her probation.

¶8 Generally, the Fourth Amendment to the United States Constitution requires a showing of probable cause before an arrest warrant may be issued. *Michigan v. Summers*,

452 U.S. 692, 699-700 (1981); *State v. Peterson*, 171 Ariz. 333, 335-36, 830 P.2d 854, 856-57 (App. 1991); *see also* Ariz R. Crim. P. 3.1(c). "Probable cause to arrest exists if the police have 'reasonable grounds to believe that an offense is being or has been committed by the person arrested.'" *Peterson*, 171 Ariz. at 335, 830 P.2d at 856, *quoting State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985).

¶9 Here, the parties do not dispute that at the time the trial court issued the warrant there was no probable cause to believe Hans had violated probation by staying in or returning to the United States illegally. However, the state seeks to justify the warrant by asserting "the trial court could reasonably presume that, if [Hans] were to return to the United States, she would be doing so illegally in violation of the conditions of her probation." Thus, the state essentially argues the warrant is valid as a type of anticipatory arrest warrant, based upon what it characterizes as a high probability that if Hans reenters the United States during her probationary term, her presence will be illegal and therefore in violation of the conditions of her probation. We have found no cases addressing the validity of similar anticipatory arrest warrants, but we find instructive cases involving anticipatory search warrants.

¶10 Our courts have held search warrants do not necessarily violate either the Arizona or United States Constitutions when they are issued upon probable cause to believe both that a crime is occurring and that evidence of such crime will be found at a specified location some time in the future. *State v. Crowley*, 202 Ariz. 80, ¶ 10, 41 P.3d 618, 622

(App. 2002); *see also State v. Berge*, 130 Ariz. 135, 137-38, 634 P.2d 947, 949-50 (1981). Such warrants are considered anticipatory because the item to be seized has not yet reached the location to be searched at the time the warrant is obtained; they are issued with the understanding that they will not be executed until the item reaches that location. *See State v. Cox*, 110 Ariz. 603, 608, 522 P.2d 29, 34 (1974). However, such warrants are still subject to the traditional requirement that there be probable cause to believe a crime has been or is currently being committed at the time they are issued.

¶11 In *State v. Vitale*, 23 Ariz. App. 37, 38-39, 530 P.2d 394, 395-96 (1975), acting on an informant's tip that Vitale was fencing stolen property, police attempted to catch him in the act of receiving stolen property by having the informant offer to sell him a stolen television set. A justice of the peace issued a warrant to search Vitale's pawnshop with the understanding that its execution was contingent upon Vitale's purchase of the television. When Vitale subsequently agreed to purchase the television from the informant, officers executed the warrant, and he was arrested for receiving stolen property. *Id.* He was ultimately convicted of the amended charge of attempting to receive stolen property. *Id.* at 38, 530 P.2d at 395. On appeal, we held the warrant was invalid because "there was no evidence of a crime having been committed at the time the warrant was issued." *Id.* at 40, 530 P.2d at 397. And, we distinguished *Vitale* from *Cox*, another anticipatory search warrant case, because in *Cox* there had been probable cause to believe the crime of transportation of marijuana was currently being committed, although officers could not

execute the warrant until the vehicle entered Coconino County. *Vitale*, 23 Ariz. App. at 40-41, 530 P.2d at 397-98; *Cox*, 110 Ariz. at 608, 522 P.2d at 34. Thus, as these cases illustrate, the lynchpin to the validity of a search warrant is "whether there was reasonable ground to believe a crime was being committed" at the time the warrant was issued. *Berge*, 130 Ariz. at 137-38, 634 P.2d at 949-50; *see also Mehrens v. State*, 138 Ariz. 458, 461-62, 675 P.2d 718, 722 (App. 1983).

¶12 In this case, even though the court gave Hans a thirty-day grace period to leave the country, it unquestionably issued the arrest warrant prospectively based on its reasoning that in the future, "if [Hans] is stopped by any law enforcement, we will have a trigger and she will be brought before me or any other judge for the next seven years to explain why she came back in the United States illegally presumably." But, even assuming Hans's mere presence in the United States at some point in the future might constitute probable cause to believe she was here illegally, in violation of the conditions of her probation, there was no indication at sentencing, or thirty days later when the warrant was issued, that Hans had already reentered or was attempting to reenter the country illegally. Thus, at the time the warrant was issued, there was no reason to believe a "crime was in progress[,] and it was a matter of pure speculation whether one would be committed in the future." *Vitale*, 23 Ariz. App. at 41, 530 P.2d at 398. Therefore, there was no probable cause to support the trial court's issuance of the warrant, and it must be quashed.

¶13 To be clear, we do not suggest the trial court was without the authority to order Hans not to reenter the United States illegally or, upon learning she was present, and having probable cause to believe she was here illegally, to issue a bench warrant for her arrest. Nor do we address whether and under what circumstances she could be arrested in the absence of a warrant. We merely hold that when an arrest warrant is issued, it must be supported by probable cause to believe the person to be arrested has committed or is currently committing a crime at the time the warrant is issued or, in the case of a person on probation, has otherwise violated the conditions of probation.

II. Double Jeopardy

¶14 Hans also argues her conviction of possession of marijuana for sale must be vacated because it is a lesser included offense of transportation of marijuana for sale. She contends her convictions for both offenses therefore violated the protection against double jeopardy. *See* U.S. Const. amend. V; Ariz. Const. art II, § 10. As previously noted, the state raised this issue first in its answering brief and conceded error. Because convictions in violation of the Double Jeopardy Clause constitute fundamental error, we address this issue. *State v. Burdick*, 211 Ariz. 583, ¶ 5, 125 P.3d 1039, 1041 (App. 2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶15 "[W]hen a possession for sale charge is incidental to a transportation for sale charge, the former is a lesser-included offense, for one cannot possibly be guilty of the transportation for sale charge without also being guilty of the possession for sale charge." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998). Here, the charges for both offenses arose from a single act of transporting marijuana for sale, and the possession thus was incidental to the transportation. Double jeopardy principles preclude Hans's convictions for both offenses.

Disposition

¶16 For the reasons stated above, we vacate Hans's conviction for possession of marijuana for sale, and remand with instructions to the trial court to quash the arrest warrant. We affirm the conviction for transportation of marijuana for sale and the sentence of probation in all other respects.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge